

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
 VONAGE HOLDINGS)
 CORPORATION)
)
 Petition for Declaratory Ruling)
 Concerning an Order of the Minnesota)
 Public Utilities Commission)

WC Docket No. 03-211

**COMMENTS
OF
THE VOICE ON THE NET COALITION**

Bruce D. Jacobs
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8000
Facsimile: (202) 663-8007

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Summary

The development of VoIP is having a gradual but profound and beneficial impact on the United States and the world. Use of VoIP is drastically reducing the cost of communications and creating a foundation for broadband communications that have much greater capacity, functionality, and are more open to innovation than what is offered by the public switched telephone network.

The Commission's long-standing policy that VoIP is an unregulated information service has encouraged the industry's innovation and growth and is consistent with the statutory mandate of Section 230(b) to preserve the "vibrant and competitive free market" for the Internet. As such, the prospect of regulation of VoIP in a variety of ways by different states is particularly problematic for a new industry like VoIP.

The VON Coalition encourages the Commission to take such action as is appropriate to maintain the *status quo* while the Commission undertakes the resolution of various relevant proceedings. The Commission may do so based on either the presumption that VoIP is an information service or the inseparability of intrastate and interstate Internet traffic.

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**COMMENTS OF
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The Voice on the Net (“VON”) Coalition¹ hereby submits these comments in response to the Public Notice released September 26, 2003 by the Wireline Competition Bureau in the above-captioned proceeding.² For the reasons stated herein, the VON Coalition supports Commission action that preempts attempts by states to regulate Voice over Internet Protocol (“VoIP”).

¹ The VON Coalition membership is developing and offering voice products and services for use on the Internet and other Internet Protocol (“IP”) networks. The VON Coalition was formed in 1996 to respond to the petition filed by America's Carriers Telecommunication Association (“ACTA”), which requested injunctive relief and a declaratory ruling that providers of IP software and hardware are telecommunications carriers subject to regulation and the access charge regime. The VON Coalition opposed the ACTA petition and subsequently participated in various Commission proceedings, including the 1998 *Universal Service Report to Congress*, the *Notice of Inquiry* regarding Section 255 disability access, the recent universal service proceeding involving review of carrier contribution mechanisms, and petitions by AT&T and pulver.com regarding VoIP. Additionally, the VON Coalition has worked with the United States government in connection with the International Telecommunication Union, including the World Telecommunication Policy Forum on IP Telephony. Additional information regarding the VON Coalition is available on its website, <http://www.von.org>.

² Public Notice, *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, DA 03-2952 (September 26, 2003).

Background

Voice on the Internet. The development of voice over IP products and services is tied closely to the development of the Internet generally. Voice is simply another application being deployed on these networks, often in combination with other applications. These applications are possible, in part, because the Internet offers openness, thereby encouraging innovation.³ (In contrast, the Public Switched Telephone Network (“PSTN”) operates as a closed system on which it is impossible for innovative developers to build new applications. The failure of Advanced Intelligent Networking illustrates the problem of closed systems impeding the development of innovative products and services.) As such, the Internet permits entrepreneurial firms to develop new hardware and software applications that can seamlessly fit into the network. As computer processing power increases, VoIP products and services are poised to make communications more innovative, affordable, and universal.

The Internet and other IP networks offer an inherent efficiency, reliability, and functionality for communications, particularly those that combine different kinds of data, including voice. The conventional circuit-switched PSTN works on the model that each customer’s equipment must have a continuous connection to a telephone company switch, whether or not the connection is actually in use. For long-distance services, a continuous link must be established and maintained between each pair of users for the duration of a call, regardless of the amount of information sent through that path. By contrast, the Internet trades increased use of computer processing for a decreased use of transmission facilities and automatically re-routes packets around problems such as malfunctioning routers or damaged

³ See, e.g., Isenberg, David, “The Dawn of the Stupid Network,” *ACM Networker* 2.1, at 24-31 (February/March 1998), available at <http://www.isen.com/papers/Dawnstupid.html>.

lines, without relying on a separate signaling network. As the cost of computer processing continues to decrease and the demand for communications bandwidth by consumers increases, IP networks increasingly offer a more economical and robust means for providing communication connections.

Propelled in part by the U.S. Government's "hands-off" regulatory approach, the development of the Internet and voice on the Internet is having a gradual but profound and beneficial impact on the United States and the world. Use of VoIP is drastically reducing the cost of international communications and creating a foundation and demand for broadband communications that have much greater capacity and functionality than is offered by the PSTN. In the U.S., hundreds of thousands of low-income immigrants have used VoIP to dramatically lower the cost of communicating with friends and relatives outside the United States, through either personal computer-based VoIP or VoIP used by prepaid calling card companies. Phone-to-gateway network configurations provide those without a computer or broadband service what is often their only access to the benefits of the Internet.

Perhaps the most dramatic impact of VoIP has been in certain foreign markets, where VoIP has been a leading force for lowering costs to consumers, increasing competition, and increasing deployment of broadband. VON Coalition members have persuasively invoked the U.S. regulatory model in lobbying overseas governments, such that in former monopoly markets the first steps toward deregulation have included implementing low-cost VoIP. For example, one VON Coalition member enabled a local carrier in Bolivia to take advantage of recent deregulation and, with no capital expenditure, become a domestic and international long distance carrier on the day Bolivia deregulated its telephony markets. Less than two years later, that carrier now has more than 40% market share in several regions of the country and averages 10-

15% market share country-wide. Consumer rates for voice communications in Bolivia have been reduced 40% in a year. Similarly, rates to and from India have fallen remarkably since that country's April 2002 deregulation and are continuing to fall. Much of the voice traffic to and from India is now traveling over the Internet, with a recent iLocus study concluding that VoIP is positioned to account for over 60% of India's international long distance traffic by the year 2007.⁴ India has been able to accomplish this because of the rapid deployment, low capital expenditures and flexibility afforded by VoIP.

VoIP is also seeing growth in deployment by enterprises for their internal networks.⁵ Corporations and other large institutions are adding voice capability to their Internet connections and data networks in order to save money and increase efficiency. For instance, the U.S. Department of Commerce recently added voice capability to its data network. Deployment in the enterprise environment ranges from point solutions, which involve the installation of key applications to address pressing problems, to network upgrades and more global solutions intended to establish a unified network capable of carrying data and voice traffic.

Personal computers increasingly offer VoIP capability. For instance, Microsoft's most recent operating systems include an application that enables voice communications. The increased deployment of consumer broadband, with its always-on connectivity, will also fuel the growth of these services. A new group of entrepreneurs has begun offering innovative voice applications to residential and small business consumers who have broadband connections,

⁴ "VoIP to grab 61 percent of ILD traffic by 2007," *Convergence plus* (June 9, 2003), available at <http://www.convergenceplus.com/jun03%20india%20telecom%2002.html>

⁵ A number of resources discuss business issues and technology considerations associated with enterprise deployment of VoIP. For example, the consulting firm Gartner has developed a five-layer model to assist enterprises planning to implement VoIP and IP telephony. See "Voice over IP: A Layered Look," (July 25, 2003), available at <http://www4.gartner.com/pages/story.php.id.9324.s.8.jsp>.

including unlimited local and long-distance calling and on-line call logs. With Free World Dialup (“FWD”) 3.0, for example, users of different broadband technologies (cable, DSL, Ethernet, satellite, etc.) can place calls over the Internet to other FWD members without ever accessing the PSTN. Unlike a traditional calling arrangement in which long-distance calls generate usage-sensitive charges, FWD subscribers use a broadband connection and VoIP capability to make calls for free. The extraordinary success of Yahoo Japan’s voice over broadband service is confirmation of the potential for voice applications to drive the deployment of broadband and for broadband customers to use their high-speed connections for voice communications.⁶

Despite this growth, the deployment of VoIP has not had significant impact on the revenue of traditional, domestic circuit-switched telephone companies. The use of VoIP by immigrants, in the enterprise setting, and by broadband consumers is not coming at the expense of incumbent local exchange carrier (“ILEC”) access charge revenue.

United States policy regarding VoIP. Since the inception of voice over the Internet, the Commission has consistently declined to regulate. The Commission articulated its policy in its 1998 *Universal Service Report to Congress*, which discusses various scenarios for what it called “IP telephony.”⁷

⁶ See “Yahoo! BB Comprehensive Broadband Service Progress Report,” (Oct. 7, 2003) (Yahoo IP telephony service “BB Phone” users exceed three million mark), available at http://www.softbank.co.jp/en/newsrelease/2003release/e031007_2.htm. Commercial service was launched on April 25, 2002; approximately one year later the number of users broke the two million mark.

⁷ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Red 11501, ¶¶ 83-93, 98 (1998) (“*Report to Congress*”) (also referred to as the “Stevens Report”). The *Report to Congress* addressed many of the issues raised in a 1996 petition for rulemaking asking that IP telephony software and hardware providers be classified as common carriers. *Id.* at ¶ 83 n. 172; see *America’s Carriers Telecommunications Association, Provision of Interstate and International Interexchange Telecommunications Service via the “Internet” by Non-Tariffed*,

The *Report to Congress* discusses the difficulty of categorizing VoIP and the extent to which many of its deployments have characteristics of unregulated, information services.⁸ As a result, the Commission expressly deferred any definitive pronouncements regarding VoIP, including phone-to-phone VoIP.⁹ As the Commission explained, “[w]e recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. . . . We do not believe . . . that it is appropriate to make any definitive pronouncements [regarding VoIP] in the absence of a more complete record focused on individual service offerings.”¹⁰

Universal service considerations provided further support for the Commission’s decision to defer action. The Commission recognized that when an exempt provider purchases connectivity to its users via business lines, that provider indirectly contributes to universal service by generating telecommunications revenue in the form of tariffed rates and line charges.¹¹ Moreover, the Commission found that since the Telecommunications Act of 1996 (the “1996 Act”) made a decisive break from the practice of implicit universal service subsidy structures, permitting enhanced service providers to purchase connectivity via end-user tariffs

Uncertified Entities, Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking, RM-8775 (filed March 4, 1996).

⁸ As noted in a 1999 Commission Working Paper, “[a]s more services are offered that use the Internet Protocol in a packet-switched environment, it becomes increasingly difficult to determine where the telecommunications service ends and the information service begins.” Oxman, Jason, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31, at p. 22. “Despite this difficulty, however, it remains important for the FCC to maintain the unregulated status of data services offered over telecommunications facilities.” *Id.*

⁹ *Report to Congress* at ¶ 83.

¹⁰ *Id.* at ¶ 90.

¹¹ *Id.* at ¶ 97.

rather than access tariffs “comports with the plain language of the 1996 Act and the public interest.”¹²

On the international stage, the Commission has consistently and repeatedly voiced its support for the non-regulation of advanced technologies, including VoIP. For example, Chairman Powell urged attendees at the International Telecommunications Union’s Second Global Symposium for Regulators to give “broadband and digital technologies” a minimally regulated environment “that is nurturing and will allow them to blossom and develop into the great platform that we envision.”¹³ Referring specifically to VoIP, Chairman Powell noted that “[i]n the United States we have yet to choose to regulate IP telephony and are confident of that decision. We do not assume it is simply a new form of an old friend.”¹⁴ In 2002, Commissioner Martin noted that “VoIP presents an incredible opportunity for consumers worldwide and we have found our approach has encouraged its development. At the same time, VoIP challenges settled definitions and preconceptions about what is voice and data, who provides which technology, and which regulatory boxes they should occupy.”¹⁵

The Commission currently has before it three pending proceedings involving the continued exemption of VoIP from the existing regulatory framework for telecommunications

¹² *Id.* at ¶ 147. In the Commission’s recent universal service rulemaking, the VON Coalition supported a proposed contribution methodology that assesses providers of switched connections based on their working telephone numbers. *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002).

¹³ *Remarks of FCC Chairman Michael K. Powell*, ITU 2nd Global Symposium for Regulators, Geneva, Switzerland (December 4, 2001).

¹⁴ *Id.*

¹⁵ *Welcoming Remarks by Commissioner Kevin J. Martin to the African VoIP Conference*, Supercomm 2002, Atlanta, Georgia (June 5, 2002).

carriers: *Petition of AT&T for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361; *Petition of pulver.com for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45; and the Vonage petition. As Vonage notes, the Commission also is considering VoIP in other pending proceedings, including its intercarrier compensation, wireline broadband, universal service, and 911 dockets.¹⁶ In addition, it appears that the Commission will be initiating a formal inquiry or rulemaking to address VoIP later this year.¹⁷ Chairman Powell contemplates a “thorough discussion” of VoIP issues:

FCC Chairman Michael K. Powell today warned against the dangers of “regulating by accident” new Internet protocol-based services and stressed the importance of thorough discussion of exactly what rules are needed in an IP world. He also said he envisioned federal policy-makers taking an increasingly dominant role over communications services and suggested that federal and state policy-makers begin discussing how that should be handled.

“What worries me most is that we don’t regulate what’s right, but that we regulate by accident,” dropping Internet services into old regulatory categories that aren’t appropriate, rather than developing the appropriate policies for such services through “thorough discussion,” Mr. Powell said during a keynote speech today at the U.S. Telecom Association’s annual conference.

Mr. Powell said the right approach was to start from the “cleanest slate possible” for Internet-based services, then decide what rules should be applied. That would be preferable, he said, to starting with extensive

¹⁶ *Vonage Petition* at 3-4, citing *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (¶ 5), 9616 (¶ 12), 9621 (¶ 24), and 9629 (¶ 52) (2001); *Wireline Broadband NPRM; Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 17 FCC Rcd 3752 (2002); and *Revisions of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576, 25614 (¶ 113) (2002).

¹⁷ See, e.g., Bischoff, Glenn, “FCC Attorney: VoIP Rules Could be Tailored to Players,” *Telephony Online*, Oct. 15, 2003 (discussing a Commission forum on VoIP in late 2003 as a precursor to the opening of a formal proceeding), available at http://telephonyonline.com/ar/telecom_fcc_attorney_voip/index.htm

common carrier regulation and determining what rules aren't necessary. "I want to build from the bottom up, if necessary," he said. "I don't think any of this means no regulations or lots of regulations. It means the right regulations for this service."

Asked about the role of state regulators in the future, Mr. Powell joked that he didn't want to "start Civil War II" with his comments. "But I do think there are some critical questions that have to do with the rational, efficient way interstate commerce is going to be regulated," he said. "For the smoothest functioning of interstate commerce," it will need to be a largely federal system, Mr. Powell said.

"I think it's an important question, and we should be willing to discuss it in the open," he said. Mr. Powell recommended discussions between federal and state regulators to determine their appropriate roles, although he said the system likely would need to be "much more federal."

Mr. Powell raised questions about recent state initiatives to regulate voice-over-Internet protocol services or wireless services, citing those as examples of the kind of "regulating by accident" that the industry needed to avoid.¹⁸

Meanwhile, several states have taken action or begun proceedings that could lead to regulation of VoIP.¹⁹ Two state commissions have already concluded that their jurisdiction

¹⁸ Hammond, Brian, "Powell Wants Comprehensive Look at Internet Policy, Sees Need for Bigger Federal Role," *TR Daily* (Oct. 14, 2003).

¹⁹ See, e.g., *In the Matter of an Investigation of Voice Over Internet Protocol and Virtual NXX Telephony in the State of Missouri*, Order Setting Time for Response, MO PSC Case No. TO-2004-0172 (Oct. 17, 2003); *Oregon Exchange Carriers Association et al. v. LocalDial Corp.*, OR PUC Docket No. UCB-19 (filed Oct. 13, 2003); *Complaint of Frontier Telephone of Rochester, Inc. against Vonage Holding Corp.*, Notice Requesting Comments, NY PSC Case 03-C-1285 (Oct. 9, 2003); *Washington Exchange Carriers Association, et al. v. LocalDial Corp.*, Notice of Prehearing Conference, Washington UTC Docket No. UT-031472 (Sept. 29, 2003); *In re Petition for a Declaratory Order regarding classification of IP Telephony Service*, Order Establishing Declaratory Proceeding, AL PSC Docket No. 29016 (Aug. 29, 2003); *In re Investigation into Voice Over Internet Protocol Services*, Order Compelling Production of Documents, Colorado PUC Docket No. 03M-220T (May 21, 2003); *Investigation into Voice over Internet Protocol as a Jurisdictional Service*, Order, PA PUC Docket No. M-00031707 (May 1, 2003); *In the Matter of the Commission's Investigation into Voice Services Using Internet Protocol*, Entry, OH PUC Case No. 03-950-TP-COI (April 17, 2003). In addition, in August 2003 the California and Wisconsin commissions sent letters to certain VoIP providers, asserting that the provider must obtain a certificate of authority to lawfully operate in the state.

extends to what they consider to be intrastate VoIP.²⁰ Not all the developments are problematic. One state legislature has adopted a statute that precludes public service commission regulation of VoIP and another, Pennsylvania, is considering legislation to codify the non-regulation of VoIP.²¹

The Vonage petition and procedural history. Vonage offers a “DigitalVoice™” service, described in its petition as a VoIP service that permits communications between users of broadband Internet connections and between Vonage customers and users of conventional telephone service.

On September 11, 2003, in response to a complaint filed by the Minnesota Department of Commerce, the MPUC issued an order finding that it has jurisdiction over Vonage and requiring Vonage to comply with state laws governing providers of telephone service. The MPUC found that Vonage offers two-way communication that is functionally no different than any other

Wisconsin adds that unless a carrier is certified, customer bills for intrastate services provided are void and not collectible. Letter of Gary A. Evenson, Acting Administrator, Telecommunications Division, Public Service Commission of Wisconsin, to Regulatory Compliance Officer, 8x8, Inc. (August 13, 2003).

²⁰ See *Complaint of Frontier Telephone of Rochester against US DataNet Corporation*, Order Requiring Payment of Intrastate Carrier Access Charges, NY PSC Case 01-C-1119 (May 31, 2002) (concluding that providers of retail intrastate phone-to-phone IP telephony services are required to pay intrastate access charges on calls that originate and terminate in New York); *In re the Commission, on its Own Motion, to Conduct an Investigation of the Interstate or Local Characteristics of Internet Service Providers Traffic*, Opinions and Findings, 1999 Neb. PUC LEXIS 50, at *1 (Neb. PSC 1999) (concluding that the NE PSC has jurisdiction over intrastate VoIP services, but declining to exercise that authority “at this time”).

²¹ Section 364.01(3), Fla. Statutes finds that “the provision of voice-over-Internet protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest.” Pennsylvania Senate Bill 900, *an Act Relating to Telecommunications*, establishes in Section 5305 a five-year regulatory exemption for VoIP service, with the exception of requirements applicable to 911 and intercarrier compensation. Section 103 of the legislation defines VoIP as “voice-grade telecommunications services which are provided through the use of Internet-routing technology over either private or public network which converts analog or digital signals into packets for transmission purposes.” SB900 is available at <http://www.legis.state.pa.us/2003%5F0/sb0900p1202.htm>.

telephony service and that Vonage's service is "clearly subject to regulation" by the MPUC.²²

Though briefed on federal law, the MPUC concluded that it "is not necessary for the [MPUC] to determine whether VoIP service is a telecommunications service or an informational service under federal law, and the [MPUC] will not do so."²³

In response, on September 22, 2003 Vonage filed its petition with the Commission requesting a declaratory ruling preempting the MPUC's order. On September 23, 2003, it filed for preliminary injunctive relief from the Minnesota District Court.²⁴

On October 7, 2003 the Minnesota District Court issued a ruling permanently enjoining the MPUC from enforcing its September 11, 2003 order.²⁵ Unlike the MPUC, which choose to disregard federal law, the court found federal law controlling:

[I]t is clear that Congress has distinguished telecommunications services from information services. The purpose of Title II is to regulate telecommunications services, and Congress has clearly stated that it does not intend to regulate the Internet and information services. Vonage's services do not constitute a telecommunications service. It only uses telecommunications, and does not provide them. The Court can find no statutory intent to regulate VoIP, and until Congress speaks more clearly on this issue, Minnesota may not regulate an information service provider such as Vonage as if it were a telecommunications provider. What Vonage provides is essentially the enhanced functionality on top of the underlying network, which the FCC has explained should be left alone.²⁶

²² *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance at p. 8 (Sept. 11, 2003), attached as Exhibit 5 to the Vonage petition.

²³ *Id.*

²⁴ *Vonage Holdings Corp. v. Minnesota Public Utilities Commission et al.*, Civil No. 03-5287 (MN D.C., filed Sept. 23, 2003).

²⁵ *Vonage Holdings Corp. v. Minnesota Public Utilities Commission et al.*, Memorandum and Order, Civil No. 03-5287 (MN D.C., Oct. 16, 2003) (*Vonage Order*).

²⁶ *Id.* at 20.

According to the court, requiring Vonage to comply with the MPUC's order "would effectively decimate Congress' mandate that the Internet remain unfettered by regulation."²⁷

On October 9, 2003, in response to the court's permanent injunction, the MPUC stayed its order.²⁸ The MPUC's stay ensures that it will not attempt to regulate Vonage as a telecommunications common carrier absent change in applicable federal policy.

Discussion

I. Inconsistent state regulation is subject to preemption

It is well-established that a federal agency, acting within the scope of its delegated authority, may preempt inconsistent state regulation.²⁹ Pursuant to Section 2(b)(1) of the Communications Act of 1934, as amended, the FCC is empowered to preempt state regulation of intrastate communications when state decisions regarding intrastate communications would negate, thwart, or impede the exercise of lawful federal authority over interstate communications.³⁰

As part of the comprehensive framework adopted in its landmark *Computer II Inquiry*, the Commission announced its intention to preempt inconsistent state regulation of enhanced, or information, services.³¹ As the Commission explained,

[W]e are convinced that *such a regulatory scheme offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network*. . . . With the nonregulation of all enhanced services, FCC regulations will not directly or indirectly inhibit the offering of these services, nor will our administrative processes be interjected

²⁷ *Vonage Order* at p. 2.

²⁸ Order Staying Order of September 11, 2003, Docket No. P-6213/C-03-108 (Oct. 9, 2003).

²⁹ *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986).

³⁰ *Id.* at 375; *see also California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) and *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989).

³¹ *Computer II Inquiry*, 77 FCC 2d 428-429.

between technology and its marketplace applications. . . . To the extent regulatory barriers to entry are removed and restrictions on services are lifted there is a corresponding potential for greater utilization of the telecommunications network. . . .³²

In accordance with this policy, the Commission in 1992 preempted an order of the Georgia Public Service Commission that barred BellSouth's offering of voice mail service in Georgia, thereby ensuring the ability of local providers to offer an enhanced service on an unregulated basis.³³

VoIP has always been presumed to be an information service. In its 1998 *Report to Congress*, the Commission affirmed that IP telephony software is not telecommunications and declined to classify any IP telephony service as a regulated "telecommunications service."³⁴ The Commission's silence since then should be construed by states as federal intent that VoIP remain unregulated.

II. Commission action is necessary to avoid a patchwork of state regulation

The VON Coalition has consistently supported the Commission's "wait and see" policy regarding voice over the Internet. VON remains a nascent industry. Premature intervention risks stifling the industry and is at odds with the statutory mandate of Section 230(b) to preserve the "vibrant and competitive free market" for the Internet. State regulation in particular risks a chilling effect and provides support for treatment of VoIP as "inherently interstate," as the Commission's Office of Plans and Policy recognized several years ago:

If federal rules governing Internet telephony are problematic, state regulations seem even harder to justify. . . . There is a good argument that

³² *Computer II Inquiry*, 77 FCC 2d at 428-430 (emphasis added).

³³ *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*) (state action preempted as inconsistent with FCC policy to allow enhanced services, such as voice mail, to be provided on an unregulated basis).

³⁴ *Report to Congress* at ¶ 87.

Internet services should be treated as inherently interstate. The possibility that fifty separate state Commissions could choose to regulate providers of Internet telephony services within their state[s] (however that would be defined), already may be exerting a chilling influence on the Internet telephony market.³⁵

The threat of a patchwork of differing state regulations is problematic for a new industry. That threat is not illusory, given that two state commissions have concluded that their jurisdiction extends to what they consider to be intrastate VoIP and, at last count, nine states had initiated their own VoIP inquiries or docketed complaints regarding VoIP providers. Given the preeminence of federal policy in this area and the complexity of the issues, the Commission should take the lead in analyzing the issues presented – an effort that the Commission has committed to undertake later this year.

Assurances that VoIP will not be regulated at the state level during the pendency of the Commission's proceedings will encourage continued competition, innovation, investment, and growth in the industry. Given the current responsibilities of VoIP providers as end-users of telecommunications, no harm will result. VoIP providers will continue to indirectly contribute to universal service through the purchase of telecommunications inputs, including local business lines (with their associated tariffed rates and subscriber line charges).

State action is not necessary to ensure that users of VoIP will have appropriate access to public safety services. VoIP industry representatives have been voluntarily working with the National Emergency Number Association's VoIP/Packet Technical Committee and VoIP Operations Committee to assess the current state of 911 provisioning in VoIP environments and

³⁵ Kevin Werbach, FCC Office of Plans and Policy, *Digital Tornado: The Internet and Telecommunications Policy*, at 40 (March 1997).

to develop solutions.³⁶ There are important differences between the provision of 911 for traditional PSTN traffic and for VoIP, but there is every reason to expect that technical solutions exist to provide users with reliable access to public safety services. Allowing states to require compliance with PSTN-based requirements today so that a VOIP provider can provide service undermines these efforts.

III. States may not regulate jurisdictionally interstate traffic

Alternatively, the Commission should determine that all VoIP traffic is jurisdictionally interstate, thereby placing it under the purview of federal regulators rather than state public utility commissions.³⁷ Given the inseparability of intrastate and interstate Internet traffic, it may be appropriate to find all VoIP traffic to be interstate.

The Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, the Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus. It determined that the entire transmission constituted one interstate call, because “there is a continuous path of communications across state lines between the caller and the voice

³⁶ Information about the NENA August 2003 VoIP conference, including presentations, is available at <http://www.nena9-1-1.org>.

³⁷ See, e.g., *GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, Memorandum Opinion and Order (1999) (denying NARUC request that the Commission clarify that the *GTE DSL Order* does not preclude states from requiring intrastate tariffs of ADSL services designed to connect end users to ISPs but reiterating that in some circumstances, ADSL services may be appropriately tariffed as intrastate services).

mail service.”³⁸ Moreover, the Commission has expressly declined to factor regulatory classifications into its jurisdictional analysis. In 1999, it rejected arguments that Internet-bound traffic must be separated into two components: an intrastate telecommunications service, provided by one or more local exchange carriers, and an interstate information service, provided by an information service provider.³⁹

The Commission relied on this type of analysis in reaching the decision in its 1998 *GTE DSL Order* that Internet access is jurisdictionally interstate due to the inseparability of interstate and intrastate Internet traffic.⁴⁰ Analyzing Internet communications as a continuous transmission from the end user to a distant Internet website, the Commission concluded that more than a *de minimis* amount of Internet traffic is destined for websites in other states or other countries. Therefore, despite the fact that it presumably carried some intrastate traffic, GTE’s DSL service was deemed an interstate service subject to federal, not state, jurisdiction.

VoIP raises similar issues regarding the inseparability of interstate and intrastate communications. The inability to distinguish the jurisdictional nature of VoIP traffic supports a finding that VoIP traffic is jurisdictionally interstate, even if it contains an intrastate component.

³⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 at ¶ 10 (1999) and Order on Remand and Report and Order, 16 FCC Rcd 9151 at ¶¶ 56-57 (2001).

³⁹ *Inter-Carrier Compensation for ISP-Bound Traffic Declaratory Ruling* at ¶ 13.

⁴⁰ *GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 (1998) (*GTE DSL Order*) (subsequent history omitted); *In the Matter of Starpower Communications v. Verizon South, Inc.*, 17 FCC Rcd 6873 at ¶ 30 (2002) (“ISP-bound traffic is jurisdictionally interstate”).

Conclusion

Therefore, based on the foregoing, the VON Coalition supports Commission action preempting state efforts to regulate the provision of VoIP.

Respectfully submitted,

THE VON COALITION



Bruce D. Jacobs
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8000

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